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Materials on Contracts

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Introduction

The materials that follow have been prepared for the purpose of exploring the way in which the law of contracts functions now and, to some extent, how it got that way.

We would like to suggest some points which should be kept in mind as you read the cases:

1. Every judgment is a product of the time at which it was delivered and the society in which it is found. In these materials there are cases from Canada, England, the U.S.A., Australia and elsewhere. There are judgments that were written as early as the civil wars in England and, of course, as late as this year. You can never ignore both the place and date of any judgment. It is often the case that a judgment can only be understood when it is realized that it was given by an English judge in, say, 1854, when certain things were happening in the society that existed at that time.

You will find that these facts about a judgment will often be forgotten or ignored. Later judges will often use an earlier case as a precedent without remembering the facts and background out of which it arose. This tendency is productive of much harm. If you have a background in history, economics, political science or English literature you should often be able to fill in the background to the case. If you do this, you will then be able to see how much any judgment can only be seen as a product of a particular period in a particular society. If this is the case, it follows that the judgment may well reflect the prevalent political, economic, moral and social ideas of the time. (By "prevalent", we mean those ideas which are congenial to the judge, his colleagues and the members of the legal profession.)

But, on the other hand, it is equally dangerous to suggest that any judgment is <u>only</u> valid for a particular time and place. The law becomes as useless for providing guidance to people who have to rely on it when it is never constant as it does when it is anachronistic. If, therefore, a judge has said that a particular case should be decided in a certain way there may be good reasons for following his lead when another similar case comes up. The balancing of the value represented by the concern for some constancy of the law over time and the need for law to reflect current social values is never likely to be easy or even always satisfactory. It is important to realize that in each case it will be necessary to consider the balance that must be achieved and the values at stake. Part of the key to understanding how this process must go on is to realize that the judge must function in a legal system where he has a special role to fill. The requirements of this role force him to respect, for example, his particular place in the judicial hierarchy, the reasonable expections that the parties

have of the extent of his discretion to decide as he might like, and the existence of legislation which might indicate the direction the legislature thinks he should go. We will see that, just as no case can be properly understood apart from its context, so no judgment can be understood apart from the institutional structure in which the judge is functioning.

2. We have talked about the values that the law exists to serve, and that the business of judging forces the judge to consider a choice between values that often are competing for application in the judgment. For example, the judge may have to consider the question of fairness between the parties to a contract and the need to encourage reliance on promises. In many cases it may be easy to accommodate both values. In others, however, one can only be achieved at the expense of the other. As you read these materials, it will be necessary for you always to ask whether or not each case makes sense. It may be that a judgment makes no sense given the values that one might expect the court to forward. It may be that a judgment that may be indefensible on the basis that the court has offered, becomes obviously valid when alternative bases for it are considered. But what does it mean to ask if a judgment "makes sense"? Briefly, it can mean anything. It may be an adequate criticism of a case to say that it was unfair -- one person may have been treated in a way that offends our sense of fair play. It may be equally valid to suggest that the result is economically expensive and results in a waste of resources. When you are asked whether a case makes sense or not, all that is being expected of you is that you be prepared to find some reason for the decision or some basis for criticism that is not simply to state, "That is the law". Blind adherence to rules is never an adequate reason for doing anything in the law. You should not expect that there will be any unanimity in the opinions on any case. The cases in these materials are chosen because they raise difficult problems of balancing competing values. They are chosen because they are interesting from a pedagogic point of view; not because they offer a succinct statement of the law in a non-contentious case.

Since the cases are chosen because they represent difficult or interesting fact situations, it should not be expected that they will only come from Ontario or Canadian courts. Of course, many cases do come from those courts, but a great many come from the U.S., England and elsewhere. The purpose of this course in contracts is not the teaching of the rules of contracts as they are applied in the courts of Ontario (or any other province) but the exploration of possible solutions to a wide range of problems in the area of contracts. Those solutions can, obviously, come from anywhere, and there is no reason to assume that Ontario has unique problems in contracts. The cases therefore can be looked at as simply examples of problems requiring solutions and as attempted solutions to those problems. We will not confine ourselves only to such problems as actual cases disclose, but we will examine hypothetical cases to see what might

happen if such cases were ever to come before a court. You should not think that solutions will only be found in the judgments of courts. Problems will be solved through legislation or through recommendations made, for example, by law reform commissions.

3. It was mentioned earlier that the judge has to function in the context of an institutional structure that imposes restrictions on his power to decide cases as he sees fit. In a sense all law can be seen as the development of restrictions on the power of the person who has to decide questions presented for decision by competing claimants, to decide as he sees fit. Sometimes the person deciding may abdicate responsibility for the decision by relying on divine revelation (e.g. by consulting the entrails of sacrificial animals or the ordeal in medieval times) or chance (e.g. tossing a coin). But in all legal controversies the decision has to be made in a way that satisfies a number of possibly competing ends. First, it must be assumed that law is a rational enterprise: we have the law because it helps us do things that we could not do without it -- we do not have law just because we think that rules are nice things to have. Second, if the law is to be a rational enterprise then it must operate in a way that permits decisions to be made on an appropriate basis. This means, for example, that there may be a place for the decision based on chance -- it is the essence of a lottery, for instance -- but that in general decisions have to be rationally defended. Third, the function of any part of the legal process must be carried out in a way that permits such a defence.

Most of the problems that are discussed in these materials are problems which the courts have had to solve. We shall therefore, be focussing our attention principally on the way in which the courts function. The courts function in a process of adjudication. The essence of this process is the way in which the parties participate in the decision. The parties in this process have the right to present proofs of facts that they allege took place, and to address reasoned arguments to the court. The normal trial of any case involves these two aspects. First the evidence on both sides is put in. This involves the calling of witnesses and the examination of correspondence. The second stage is the argument on the law. Counsel for one side may argue that the facts support the application of one rule -- counsel for the other side may argue for another rule. The judgment when given by the judge first states the facts as found by him -- he may believe one side and not the other -- or think that one version is more likely than the other -- and then applies the law as he sees it to those facts.

This process of decision making has a number of very important consequences:

1. Before counsel for either side can know what facts to put in, he has to have some idea of the possibly applicable rules of law. If he wants to argue that

a particular rule applies he has to make sure that he has the facts to support his argument.

2. The idea of "reasoned argument" presupposes that there are agreed standards of argument that the counsel and judge both know. There can, for example be no reasoned argument if the decision turns on the toss of a coin or the judge's whim.

3. The judge in his role as fact-finder can determine the legal result. If fact "a" is necessary to the application of rule "A", there can be no question of the application of that rule if the judge finds that fact "a" does not exist.

4. The same result will follow if the counsel for the side that wants to argue for the application of rule "A" cannot prove fact "a".

5. Counsel must be prepared to argue his case on the basis of the facts as they are found by the judge, and since on appeal, the appeal court is not normally free either to hear new evidence or to review the findings of fact by the trial judge, the arguments at that level are almost entirely on points of law and there is no point in suggesting how different the result might have been if only the facts were not as they were found to be.

All these points must be borne in mind as you read the cases in these materials. You will have to consider how well counsel got the facts before the judge. (It is one of the features of our legal system that the responsibility for fact gathering rests entirely on the parties). You will have to consider how well counsel argued the case for his or her client. This will probably be the principal concern of class discussion,but you must not think that, from an entirely practical point of view, this aspect of the process is any more important than any other. You will also have to be able to see whether or not the judge found something to be a "fact" simply to make his job of deciding the case easier. If the fact-finding function is performed by a jury and not by a judge, you will have to consider, first, what question the jury was asked to determine, and, second, how far the jury simply found a fact or made a judgment based on its perception of the propriety of one party's conduct. (See, e.g., Hadley v. Baxendale, infra, p. 121)

If the process of adjudication is to operate properly, the parties must be able to rely on the judge's acceptance of the rules of law as providing the criteria for his decision. This is the same point that was mentioned earlier in connection with the need for rules to be constant and recognized by the judge as binding. If the law is out of date and in need of reform, it will often be a difficult question how far the judge,

consistent with his role in the process, can accommodate the pressures for reform. Will he be undercutting the reasonable reliance of one party on the existing law? Has he got the facts necessary to enable him to make the right decision in the case before him? Does the judge know enough about the likely effects of the adoption of one or other of the rules competing for application? All these are important and difficult questions. The same limitation on the judge operates to restrict both his freedom to find the facts and his recourse to facts not put before him by the parties. A judge who finds facts simply to justify the application of a particular rule is undercutting the process of adjudication. A judge who attempts to find facts other than those presented by counsel is destroying any effective participation from them. Again these issues raise important and difficult questions, since a judge may have an obligation to do more than decide the dispute on the terms that counsel have put forward.

All these questions have to be considered not just at the level of the trial judge but also at the appellate level. Here the issues are slightly changed. The appellate courts may not be free to review the facts as found by the trial judge, but they may be more free to reconsider rules of law that the trial judge could not. The trial judge may properly have regarded himself as bound by a decision of the Ontario Court of Appeal. But that court may be free to reconsider its own previous decision and to do what the trial judge could not do. Similarly, the Supreme Court of Canada, as the ultimate court in Canada, may be more free than the Ontario Court of Appeal to reconsider any area of the law and to decide that the law should be changed or developed in some way. But again there are restrictions on how far even the Supreme Court of Canada can go here. Should the court ignore the fact that parties may have relied on the law being as the lower courts had believed it to be? How far should the Supreme Court of Canada go in changing the law? Should it limit the change to the narrow facts of the case before it, or should it seek to deal with a wider range of cases? What should the appellate court do if it needs more facts before making its decision? These questions raise one of the very basic problems in law reform. This is the question of which of the available bodies to make the reform should do so. Should the court do so or should the legislature do so? Does inactivity by one justify activity by the other? What are the characteristics of each method that would enable us to decide which should make the changes?

4. The present law of contracts is a residual category of the law. Historically, the idea of contract was a "greedy" category and it swallowed up other areas of the law. For example, the ownership of land originally expressed political and social relationships. Gradually these became less and less important as the freedom of owners of land to sell and use their land became part of their freedom to arrange their affairs through contracts. Recent developments in the law have reversed this trend. A century ago the law of contract governed almost completely the relations of buyer and seller, employer and employee,

landlord and tenant, doctor and patient, builder and landowner, etc. Now many of these relations have become subject to legislative control in one form or another. For example, the law of employer and employee is almost entirely outside the scope of contract. The process of collective bargaining is carried out under a statutory scheme; the contents of the employment contract are regulated by statute: The Employment Standards Act, R.S.O. 1970, c. 147; The Canada Labour Code, R.S.C. 1970, c. L.1. The relation of landlord and tenant is now controlled by legislation designed to redress the imbalance of bargaining power between them. In a similar way, the contractual relations of business and consumers are now governed by legislation like the Consumer Protection Act, R.S.O. 1970, c. 82 (as amended) and the Business Practices Act, S.O. 1974, c. 131. More developments of this kind are to be expected in the future.

The significance of this trend for our purposes is that it becomes necessary to study the legislation that has had such a dramatic effect on so much of the traditional law of contracts. We shall have to see what remains of the law of contract and how well it will serve or can be made to serve the functions that society has for it.

The arrangement of the materials reflects our personal approach and we certainly do not believe either that this approach is the only valid one to take or that it is the best that could ever be devised. It represents what we think, at the moment, is a possible arrangement. We think, for example, that it makes sense to begin by investigating the consequences of the breach of a contract, and so we will start this course by examining cases that present problems that, in one sense, arise only at the end of a contractual relationship. We do this for the following reasons:

1. About the only possible way to define a contract is that a contract is a promise which the law will enforce, This definition is not very helpful. To know what promises the law will enforce is only to know the whole law of contracts. However it does make sense to know what the law will do if it does decide to enforce a promise. This knowledge will make more intelligible the later inquiry into the kinds of promises the law will enforce.

2. The cases on breach are among the simplest cases that can be studied by a beginning law student. This is not to say that any case at the outset of law school is simple, but only to say that it is fairly easy to understand the issues and what is going on in a case like Peevyhouse v. Garland Coal -- the first case in these materials. The difficulty is, of course, that no case has ever been litigated or a judgment written for a person who knows nothing about the law. The judge and the lawyers involved

in any case are functioning in the context of an existing legal system and their respective responsibilities do not permit them to consider the needs of law students. But the issues presented by the case may be readily understandable and anyone may have a valid criticism to make of the result reached by the court and even of the process of getting there.

3. If any single key can be suggested for the understanding of law and of contracts in particular it is that one must always ask in respect of every case, "Who is suing whom, and for what?". As you find out more about the history of the common law, you will discover that the common law has developed by a process which focussed on the remedies available in various situations. The common law has never bothered to define a "contract", instead the law has been concerned with the kind of remedy that will be available in certain circumstances. If we begin our study of the law by focussing on the remedies that the law offers, we will be reflecting the very pragmatic approach of the common law. The lawyer always has to ask himself what he can get for his client: he is not concerned whether or not there is a contract if he cannot obtain any advantage or avoid any harm if there is one.

4. As a practical matter, every lawyer who is asked to consider a contracts dispute will have to decide if the amount in issue makes it worth starting or defending an action. The writ that is issued to start the action requires the plaintiff to specify how much he wants. A consideration of the remedies available for breach of contract can give a lawyer an answer to the question, "How much can my client get if we sue?"